

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 06 October 2003

BALCA Case No. 2002-INA-278
ETA Case No. P2000-CA-09502201

In the Matter of:

LUCKY STAR INDUSTRIES, INC.,
Employer,

on behalf of

YUEQING CHEN,
Alien.

Certifying Officer: Martin Rios
San Francisco, California

Appearance: Dan E. Korenberg, Esquire
Encino, California
For Employer and Alien

Before: **Burke, Chapman and Vittone**
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arose from an application for labor certification on behalf of Yueqing Chen (“Alien”) filed by Lucky Star Industries, Inc. (“Employer”) pursuant to section 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. §1182(a)(5)(A) (the “Act”) and Title 20, Part 656 of the Code of Federal Regulations (“C.F.R.”). The Certifying Officer (“CO”) of the United States Department of Labor denied the application, and the Employer requested review pursuant to 20 C.F.R. § 656.26. The following decision is based on the record upon which the CO denied certification and the Employer’s request for review, as contained in the Appeal File (“AF”) and any written arguments of the parties.

STATEMENT OF THE CASE

On December 28, 1998, Employer filed an application for labor certification on behalf of the Alien for the position of Electronic Engineer. (AF 113-114). The job requirements were a bachelor's degree in Electrical Engineering or Electronic Engineering, and two years of experience in the job offered. The job duties were described as:

Design and manufacture the special video & audio machines such as v-o automatic loaders, v-o automatic transfer machines, etc. Will be engaged in the development of the utilization of single-micro-computer and utilization of PLC. Will repair CPU controlling parts of injection molding machines and all other electronic equipment. Will prepare technical reports for the management[']s review, so as to keep them apprised of the development of the projects. Will perform design preparation, innovations and estimates of the projects.

(AF 113). Employer described the nature of its business activity as "Manufacturer & Distributor of Audio, Video & other Plastic Products."

On April 8, 2002, the CO issued a Notice of Finding (NOF) indicating intent to deny the application on two grounds. First, the CO found that Employer has listed an address that was actually a residence, and therefore failed to demonstrate that it was an on-going business that could provide permanent, full time employment to which U.S. workers can be referred. To remedy the deficiency, Employer was required to document its ability to provide permanent, full time employment to a U.S. worker. Second, the CO asserted that according to the state agency Employer was a warehouse and was not engaged in manufacturing or design. Therefore, the CO found that the two years experience requirement as an Electronic Engineer was restrictive. To remedy the deficiency, Employer was advised that it could amend the requirements, justify the requirement as a business necessity, or submit documentation demonstrating that the requirement is usual in the industry. (AF 108-111).

In a May 13, 2002 rebuttal (AF 38-107), Employer asserted that it was an on-going organization that was offering a job that was clearly open to any U.S. worker. To support its assertions, Employer submitted a copy of its business license, a copy of its lease agreement and copies of its 1998, 1999, 2000 and 2001 income tax returns. Employer challenged the CO's finding that the experience requirement was restrictive by asserting the following:

The employer, Lucky Star Industries, Inc., is a manufacturer and a distributor of audio, video and other plastic products. The employer had developed various video cassette housing to work with video cassette duplication and loading machines. One of the video cassette housing developed by the employer is the Styrofoam video cassette housing used in the mailing of video advertisements. For this invention, the employer was granted a United States Patent.

The employer also developed a video cassette that is 50% lighter than a regular video cassette housing which helps decrease the cost of shipping. Another feature that was developed by the employer in the process of designing and manufacturing its products is a Full Face video housing on which an advertiser can place a whole surface label (4 x 6).

All of the products mentioned above were engineered to comply with the industry's standards and to be compatible with various video loading machines that are currently on the market. Mr. Chen, who is working for Lucky Star Industries, Inc., in an H-1B (Temporary Worker) status, designed the controlling parts for all of the above mentioned inventions. Also, Mr. Chen worked with the employer's Chinese business partners that supply the employer with parts for its projects, and provided the assessment of the project's viability, cost and work schedule.

Also Mr. Chen, in the position of Electronics Engineer, conducts product studies, researches and develops market analysis and surveys of various electronic components and accessories for the employer's projects.

Mr. Chen designs, manufactures and tests special video and audio machines such as v-o automatic loaders, v-o automatic transfer machines, etc. He also is engaged in the development of the utilization of single-micro-computer, and PLC. He repairs CPU, controlling parts of injecting molding machines, and all other electronic equipment. Mr. Chen also prepares technical reports for the management's review in order to keep it informed as to the projects' development.

The position held by Mr. Chen requires very specialized training in the methods and principles of electronics engineering which can only be acquired through a prolonged, formal, and specialized education in various areas of science, and for which at least a bachelor's degree is awarded. Moreover, a requirement of at least two years of experience is reasonably related to the employer's needs. The duties, as described, require a high level of expertise and an independent decision making. Also, the employer does not have practice of training professionals on the job due to its busy work schedule.

The employer submits that it is not merely a warehousing facility as the CO contended in the Notice of Findings, but it manufactures and distributes products that require the expertise of an Electronics Engineer. Also, due to the level of responsibility involved in the position in question, it is not unduly restrictive to require a candidate to have a two-year experience in the field in addition to the bachelor's degree. As will be shown below, most employers of Electronics Engineers in the Los Angeles area require more than two years of experience in the field.

(AF 40-41). Employer argued that the position is consistent with the description of Electronic Engineer in the Occupational Outlook Handbook (2002-2003 Ed) ("OOH") because Electronic Engineers "design, develop, test and supervise the manufacture of electrical and electronics equipment." (AF 41, quoting the OOH at 110). Employer also observed that the Dictionary of Occupational Titles ("DOT") lists the position of Electronics Engineer, DOT Code 003-061-030, at an SVP equivalent to 4 to 10 years. (AF 41) Finally, Employer referred to other Electronic Engineering positions advertised in the Los Angeles region as illustrating that a degree plus experience requirement is common in the industry. (AF 41). Offered as documentation of this point were several Internet job posting for Electronics Engineers. (AF 101-107).

On May 30, 2002, The CO issued a Final Determination (FD) denying certification. (AF 36-37). The CO found that Employer's Rebuttal failed to adequately establish that it had a bona fide Electronic Engineer job offer. The CO based his finding on the fact that although Employer had significant sales, its income showed losses for three straight years of almost two and a half million dollars. Additionally, the business license was issued after the NOF and the lease indicated that the premises are to be used for warehousing and distribution. In respect to the restrictive requirement, the CO noted

that Employer asserted in its Rebuttal that it manufactures cassette housings and packaging. The CO found that such business does not require the services of an Electronic Engineer. Further, Employer did not provide evidence that the machines noted by Employer in box 13 of the ETA-750 A were actually used by Employer. As noted in the NOF, Employer's primary activity was warehousing and distribution; therefore Employer's requirements were excessive and non-compliant with the regulations.

On June 24, 2002, Employer filed its Request for Review. (AF 1-4). Employer asserted that it had demonstrated that it had a bona fide position, as it had employed the Alien since 1998, paying him a salary well above the prevailing wage. Employer also asserted that it had control over the expenses reflected in the income tax return. Consequently, it could, if needed, reduce some expenses in order to make sure that the Alien's salary was paid.

In regards to the restrictive requirement, Employer asserted that it had met the business necessity test under *Information Industries*, 1988-INA-82 (Feb. 9, 1989) (*en banc*). As the Employer was a manufacturer of audio, video and other plastic products, Employer required an Engineer for the research and development of its new products. Employer enclosed a copy of its electric bill showing usage of 55,000 kwh per month, which clearly demonstrated that the Employer was a manufacturer.¹ Since the job requires analysis of projects, Employer concluded that the position requires an Electronic Engineer to perform that task. On those grounds, Employer requested review of the denial.

On September 13, 2002, Employer submitted a note indicating that it was not submitting an additional brief because its Request for Review included a legal brief.

¹ Evidence first submitted with a Request for Review will not be considered by the Board. *La Prairie Mining Limited*, 1995-INA-11 (Apr. 4, 1997); *Capriccio's Restaurant*, 1990-INA-480 (Jan. 7, 1992). Employer's last opportunity to supplement the factual issues of the case is in the Rebuttal. (See 20 C.F.R. §656.24). Therefore, it is the employer's burden at that point to perfect a record that is sufficient to establish that a certification should be issued. *Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999) (*en banc*).

DISCUSSION

The Board defined how an employer can show "business necessity" in *Information Industries, Inc.*, 1988-INA-82 (Feb. 9, 1989) (*en banc*). The *Information Industries* standard requires that the employer show:

(1) that the requirement bears a reasonable relationship to the occupation in the context of the employer's business; and

(2) that the requirement is essential to performing, in a reasonable manner, the job duties as described by the employer.

The first prong of the test establishes a link between the job requirements and the employer's business. For example, with a foreign language job requirement, it is helpful to show the amount of the employer's business which involves foreign-speaking clients or use of the foreign language. The second prong of the test ensures that the job requirement is related to the job duties which the employee must perform. For example, with a foreign language requirement, it is important to show that the employee communicates or reads in the foreign language while performing the job duties.

The CO in the NOF advised Employer that its experience requirement was restrictive because the CO suspected that Employer did not engage in manufacturing or design, but instead was exclusively a warehouse.² Employer's burden on Rebuttal, therefore, was to document that it was in fact a manufacturing outfit that required the knowledge and services of an Electronic Engineer to design and/or produce its products.

It is difficult from the evidence of record to identify exactly what Employer's business activities include, other than that they relate to audio and video products.

² The record supports the conclusion that Employer's primary business is a wholesale business. On its tax forms, Employer lists its business code under the North American Industry Classification System (NAICS) designations as 421600, which is "Wholesale trade – electrical goods." (*e.g.*, AF 46). The tax forms show Employer's business activity as "IMPORT & WHOLES." (*e.g.*, AF 47). On the business lease supplied by Employer, the lease purpose is listed as "WAREHOUSE AND DISTRIBUTION AND MANUFACTURING." (AF 89).

Employer's description of its business indicates that one of its primary activities is development and wholesale of cassette housings.³ Employer's assertion seems to be that it needs an electrical engineer to ensure that its cassette housings comply with industry standards and to ensure that its housings are compatible with various video loading machines on the market. Employer observed that the Alien had designed the controlling parts for its inventions -- a Styrofoam video cassette housing, a light weight cassette housing, and a full face video housing. However, what such designs have to do with electrical engineering is not obvious. Rather, Employer seems to be describing the services typically performed by a packaging designer or mechanical engineer.

The closest Employer gets to describing the services of an Electronics Engineer is its assertion that the Alien "designs, manufactures and tests special video and audio machines such as v-o automatic loaders, v-o automatic transfer machines, etc." and is "engaged in the development of the utilization of single-micro-computer, and PLC. He repairs CPU, controlling parts of injecting molding machines, and all other electronic equipment." What v-o automatic loaders or transfer machines are, and how their design, manufacture and testing require the services of an electronics engineer, however, is not explained. Similarly unexplained are references to utilization of a "single micro computer" and "PLC." Finally, Employer seems to be asserting that the position will require an electronics engineering to repair manufacturing computers and equipment. But once again, Employer's description of the need for the services of an Electronics Engineer is short on details. The Internet job postings do show that it is typical for companies to require a degree plus experience when seeking Electronic or Electrical Engineers. None of the job listings, however, involve Employer's type of business activity. Although a written assertion constitutes a documentation that must be considered, a bare assertion without supporting reasoning or evidence is generally insufficient to carry an employer's burden of proof. *Gencorp*, 1987-INA-659 (Jan. 13, 1988).

³ Employer's description of the manufacture and sale of audio, video and "other plastics" further suggests that its business is related to packing materials for electronic products rather than electronic products themselves. The record is ambiguous in this respect.

Employer's notation that the DOT SVP would permit a 4 to 10 years of experience requirement is well taken; but the CO's citation of deficiency here is not the length of the requirement, but rather whether electronic or electrical engineering experience is justified in the context of Employer's business.

The record suggests that Employer's primary business is wholesaling, and to some extent manufacture, of audio and video products. Given the ambiguity concerning the nature of Employer's business and products, however, we cannot find that Employer has established that the two year experience requirement bears a reasonable relationship to the occupation in the context of the employer's business. Moreover, given the generalized nature of its assertions about the electronic engineering duties that purportedly would be performed, we find that Employer has not established that the requirement is essential to performing, in a reasonable manner, the job duties as described by Employer.

Because we find that Employer failed to establish business necessity for its two year experience requirement we do not reach the viability of the business issue.

ORDER

The CO's denial of labor certification in this matter is hereby **AFFIRMED**.

Entered at the direction of the Panel by:

A

Todd R. Smyth
Secretary to the
Board of Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.